Fung Yuk Lien v Foong Chee Sam (as administrator of the estate of Kong Muk Tei, deceased)

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO 24–79 OF 1996
TEE AH SING J
6 MARCH 2000

Civil Procedure *— Affidavits — Jurat — Validity of — Name of person who interpreted contents of affidavit to deponent omitted — Whether jurat was valid — Rules of the High Court 1980 O 41 r 1(7) & (8)*

Land Law *— Restraints on dealings — Caveats — Validity of — Possibility of resulting or implied trust arising in respect of land, whether caveatable interest — Claim to specific interest in land —Caveat entered upon whole land — Whether caveat null and void and of no effect*

The plaintiff lodged a caveat against a piece of land under s 173 of the Land Code (Cap 81). In her statutory declaration, the plaintiff stated that she was claiming the right to caveat the land because the land was transferred to her mother on the understanding that the land shall revert to her and her sister if their mother shall predecease them. When the statutory declaration was sworn by the plaintiff, her sister had already passed away. The plaintiff did not state in the statutory declaration that she was also representing the estate of her deceased sister to lodge the caveat. It was also not stated that the claim to the land was on behalf of herself and the estate of her deceased sister. The plaintiff filed an application that the caveat shall not lapse and be removed and be allowed to remain on the land register until trial or further order. The issues before the court were whether: (i) the affidavits were defective due to improper jurat and without the word 'solemnly'; (ii) the plaintiff had a caveatable interest in the land; and (iii) the caveat was void.

Held:

(1) The name of the person who interpreted the contents of the affidavit to the deponent before she placed her thumbprint was not filled in. Therefore the jurat was defective and this was a serious defect. Order 41 r 1(7) and (8) of the Rules of the High Court 1980 ('the RHC') use the word 'must' which connotes that it is a mandatory requirement. In view of the serious defect and the mandatory requirement of O 41 r 1(7) and (8) of the RHC, the jurat was not a valid jurat. The serious defect could not be termed irregular. Therefore O 41 r 4 of the RHC was not applicable (see p 548D–G).

(2) There is no prescribed form as to the wordings to be used in the affidavit under the RHC. Therefore in the present case, the words 'do affirm' without the word 'solemnly' is in order and not defective (see p 549B–C).

(3) There was a triable issue raised as to whether there was a resulting trust or an implied trust in respect of the land. An implied or resulting trust affecting land in Sarawak need not be in writing and the English Statute of Frauds and the English Law of Property Act 1952 has no application in Sarawak. The implied or resulting trust gave rise to the plaintiff a registrable interest which can be entered as a caveat (see p 551E, H–I).

(4) Under s 174 of the Land Code, a person who claims an interest in a specific portion of land may caveat the whole land provided that the effect of the caveat is to cover the particular interest claimed. In the present case, the plaintiff caveated the whole of the land without expressly stating that it was to protect her limited interest in the land only. The caveat contained a serious defect in failing to comply with the mandatory requirement of s 174(1) of the Land Code. Therefore the plaintiff's entry of the caveat against the whole of the land was null and void and of no effect and the court had no power to allow a defective or invalid caveat to amended. Therefore, the court ordered that the caveat lodged by the plaintiff to be removed from the register (see pp 553G–I, 554B).

[Bahasa Malaysia summary

Plaintif telah memasukkan kaveat terhadap sebidang tanah di bawah s 173 Kanun Tanah (Bab 81). Di dalam perakuan berkanunnya, plaintif telah menyatakan bahawa beliau menuntut hak untuk memasukkan kaveat ke atas tanah kerana tanah tersebut telah dipindahkan kepada ibunya di atas persefahaman bahawa tanah tersebut akan berbalik kepadanya dan kakaknya jika ibu mereka meninggal terdahulu daripada mereka. Semasa akaun berkanun diikrarkan oleh plaintif, kakaknya telah pun meninggal dunia. Plaintif tidak menyatakan di dalam akaun berkanun bahawa beliau juga mewakili estet mendiang kakaknya untuk memasukkan kaveat. Ia juga tidak dinyatakan bahawa tuntutan terhadap tanah tersebut adalah bagi pihaknya dan estet mendiang kakaknya. Plaintif telah memfailkan permohonan bahawa kaveat tidak akan luput dan dialihkan dan dibenarkan untuk dikekalkan di atas daftar tanah sehingga perbicaraan atau perintah selanjutnya. Isu-isu di hadapan mahkamah adalah sama ada: (i) affidavit tersebut adalah defektif kerana jurat yang salah dan tanpa perkataan 'bersungguh-sungguh'; (ii) plaintif mempunyai kepentingan yang boleh dikaveatkan ke atas tanah; dan (iii) kaveat tersebut adalah tak sah.

Diputuskan:

(1) Nama orang yang menterjemahkan kandungan affidavit tersebut kepada deponen sebelum beliau meletakkan cap jari telah tidak diisi. Oleh itu jurat tersebut adalah cacat dan ini adalah kecacatan yang serius. Aturan 41 k 1(7) dan (8) Kaedah-Kaedah Mahkamah

Tinggi 1980 ('KMT") menggunakan perkataan 'mestilah' yang membawa konotasi bahawa ia adalah keperluan mandatori. Memandangkan kecacatan serius dan keperluan mandatori A 41 k 1(7) dan (8) KMT, jurat tersebut bukanlah jurat yang sah. Kecacatan serius tersebut tidak boleh dikatakan sebagai ketidakpatuhan. Oleh itu A 41 k 4 KMT adalah tidak terpakai (lihat ms 548D–G).

(2) Tiada bentuk yang diperuntukkan berkenaan dengan perkataan-perkataan yang patut digunakan di dalam affidavit di bawah KMT. Oleh itu di dalam kes ini, perkataan-perkataan 'mengikrarkan' tanpa perkataan 'bersungguh-ssungguh' adalah teratur dan tidak defektif (lihat ms 549B–C).

(3) Terdapat isu yang boleh dibicara dibangkitkan sama ada terdapat amanah berbangkit atau amanah tersirat berkenaan tanah tersebut. Suatu amanah berbangkit atau amanah tersirat berkenaan tanah di Sarawak tidak semestinya dalam bentuk bertulis dan Statut Fraud Inggeris dan Akta Harta Tanah Undang-undang Inggeris 1952 tidak terpakai di Sarawak. Amanah berbangkit atau tersirat memberikan plaintif hak yang boleh didaftarkan yang boleh dimasukkan sebagai kaveat (lihat ms 551E, H–I).

(4) Di bawah s 174 Kanun Tanah, seseorang yang menuntut suatu kepentingan di dalam bahagian yang khusus boleh mengkaveatkan keseluruhan tanah dengan syarat bahawa kesan kaveat tersebut adalah untuk meliputi kepentingan yang dituntut. Di dalam kes ini, plaintif telah mengkaveatkan keseluruhan tanah tanpa menyatakan secara nyata bahawa ia adalah untuk melindungi kepentingannya yang terhad di dalam tanah tersebut sahaja. Kaveat tersebut mengandungi kecacatan yang serius kerana gagal untuk mematuhi keperluan mandatori s 174(1) Kanun Tanah. Oleh itu kemasukan kaveat plaintif ke atas keseluruhan tanah adalah batal dan tak sah dan tiada kesan dan mahkamah tiada kuasa untuk membenarkan kaveat yang defektif atau tak sah untuk dipinda. Oleh itu, mahkamah mengarahkan bahawa kaveat yang dimasukkan oleh plaintif dialihkan daripada daftar tersebut (lihat ms 553G–I, 554B).]

Notes

For cases on caveats generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2580–2810.

Cases referred to

Agnes Wong Yen Hee v Tan Cheong Tie [1992] 3 CLJ 1393 (refd)

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)

Goh Paik Swan v Ng Choo Lum [1996] 3 MLJ 437 (refd) A
Lim Goh Huat v Saw Keng See [1998] 6 MLJ 600

Legislation referred to

Land Code (Sarawak Cap 81) ss 173(a), (b), (c), 174(1), 177(1), (2), 181 B
Law of Property Act 1925 [UK]
Rules of the High Court 1980 O 41 rr 1(7), 1(8), 4
Statute of Frauds 1677 [UK]

Wong Ho Leng (*Wong Ho Leng & Co*) for the plaintiff.
George Lim (*Battenberg & Talma*) for the sefendant. C

Cur Adv Vult

Tee Ah Sing J: This is an application by the plaintiff under s 17 of the Land Code (Cap 1) ('the Land Code') that the caveat vide instrument No L 8846/1995 registered on 17 August 1995 affecting all that parcel of land described as Lot 134 Block 16 Seduan Land District ('the said land') D shall not lapse and be removed and be allowed to remain on the land register until trial or further order.

The application is supported by the affidavit of Fung Yuk Lien @ Foong Yuk Lien (f) affirmed on 5 October 1996.

It is also supported by the affidavit of Foong Yuk Chiu (f) affirmed on E 8 October 1996.

It is also supported by the affidavit of Wong Sing Huo affirmed on 5 October 1996.

An affidavit was affirmed by Ling Hee King on 4 January 1997.

An affidavit was affirmed by Kong Muk Tei (f) on 12 May 1997. F

An affidavit was affirmed by Foong Chee Sam alias Fong Chee Sam on 12 May 1997.

An affidavit was affirmed by Celes Bujang anak Pengabang on 22 May 1997. G

An affidavit in reply was affirmed by Fung Yuk Lien @ Foong Yuk Lien (f) on 27 June 1997.

An affidavit in reply was affirmed by Chiong Lei Hiong (f) on 27 June 1997.

On 18 February 1998, the defendant died intestate. And on 4 January H 1999, Foong Chee Sam @ Fong Chee Sam, the administrator of the estate of the defendant was made a party to this action.

The learned counsel for the plaintiff has put in a lengthy written submission. Similarly, the learned counsel for the defendant has put in a lengthy written submission. There was an oral reply by the learned counsel for the defendant to the submission of the learned counsel for the plaintiff. I Similarly, there was an oral reply by the learned counsel for the plaintiff. I have considered the submissions.

A The learned counsel for the plaintiff submitted that the affidavit of Kong Muk Tei (f) is defective for lack of a jurat or a proper jurat.

The name of the person who interpreted the contents of the affidavit to the defendant before she placed her thumbprint thereon was not filled in. The jurat was incomplete or improper. The affidavit is defective and cannot B be used as it has failed to comply with O 41 of the Rules of the High Court 1980 ('the RHC'). In support the case of *Lim Goh Huat v Saw Keng See* [1998] 6 MLJ 600 was cited. He also submitted that irregularities in affidavits especially those pertaining to the jurat cannot be waived by the parties.

C The learned counsel for the defendant contended that the plaintiff had waived the irregularity by filing affidavits in reply to the affidavit of Kong Muk Tei (f). He urged the court to allow this affidavit to be used under O 41 r 4 of the RHC notwithstanding its irregularities.

D Order 41 r 1(7) and (8) reads as follows:

> (7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.
>
> (8) A jurat must be in one of the forms in Form 78.

E In *Malaysian Court Practice, High Court* (Vol 1) para 41.1.13 at p 2515, the meaning of 'jurat' is explained as follows:

> [41.1.13] Jurat
>
> A jurat means a certificate of the administering officer or a person before whom the affidavit was sworn. It refers to the clause written at the foot of the F affidavit, stating when, where, and before whom such affidavit was sworn. A jurat must be in one of the forms in Form 78. Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

In our case the jurat of the affidavit of Kong Muk Tei (f), is in the following G form:

Affirmed by the said KONG MUK TEI (F) at Sibu this 12 May 1997 H at ..... am/pm through the interpretation of:	))))))	(Marked with thumbprint) .....

BEFORE ME:

I

(Sgd TEO CHONG LEE
with the seal Pesuruhjaya
Sumpah Malaysia No Q004)

In *Lim Goh Huat v Saw Keng See*, his Lordship Abdul Kadir Sulaiman J at p 609 said: A

> It is clear from the jurat in affidavit in (a) that the respondent is illiterate in Bahasa Malaysia. This is further supported by the evidence in the signature of the respondent which was in Chinese character. In the circumstances, owing to the absence of the required certificate in the jurat, the affidavit in (d) becomes inadmissible as evidence in the case. The fact that the affidavit was admitted by the learned sessions judge does not make it admissible during this appeal proceedings because an appeal before me is in the nature of a rehearing. That is not all. What then is the status of the affidavit in (a)? The provision of O 25 r 24 is very clear. In a situation where the deponent is illiterate or blind, the person administering the oath must certify the three matters stipulated therein. There is a certificate to the effect that the said affidavit was read to the respondent. There was also in the certificate that the affidavit was explained to her in Cantonese (Kongfu). But by certifying such, it does not in any way mean that the deponent seemed perfectly to understand it, the second requirement needed under the rule. No doubt it was explained to her, but the question is whether she really understood what was being explained to her. In the circumstances, I rule that this affidavit in (a) is as well defective. As the defect in the two said affidavits are serious, they are inadmissible for the purpose of the evidence in support of her application for summary judgment against the appellant.

B C D

The name of the person who interpreted the contents of the affidavit to the deponent before she placed her thumbprint mark was not filled in. E

As such, I am of the view that the jurat is defective and this is a serious defect. Further, O 41 rr 1(7) and (8) of the RHC use the word 'must' which connotes that it is a mandatory requirement. In view of this serious defect and the mandatory requirement of O 41 rr 1(7) and (8) of the RHC, the jurat is not a valid jurat. F

O 41 r 4 of the RHC read as follows:

> An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

I am of the view that the serious defect in the jurat without the name of the person who interpreted the contents of the affidavit to the deponent before the deponent thumbprint cannot be termed irregular. Therefore O 41 r 4 of the RHC is not applicable. G

In *Malaysian Court Practice High Court* (Vol 1) para 41.1.13 at p 2516 reads as follows:

> The words 'before me' however should always appear and the irregularities in the form of the jurat cannot be waived by the parties: *Pilkington v Hinsworth* (1835) 5 LJ Eg 47, 160 ER 250; *Teh Kim Chooi v Regina* [1955] MLJ 37. H

As such, I am of the view that the argument in regard to waiver must fall. Therefore the affidavit of Kong Muk Tei (f) cannot be accepted. Thus, the plaintiff's allegations in her affidavit in support, in so far as they were made against the defendant remain uncontradicted. These allegations are therefore deemed admitted (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 at p 385). I

A I shall next deal with the objection to the affidavit of Foong Chee Sam @ Fong Chee Sam. The relevant part of the afidavit of Foong Chee Sam @ Fong Chee Sam affirmed on 12 May 1997 reads as follows:

> I FOONG CHEE SAM alias FONG CHEE SAM of Lot 143 Salim/Stabau Road, Middle Salim do hereby affirm as follows:

B The learned counsel for the plaintiff contended that the proper format should have been 'solemnly affirm' or 'solemnly and sincerely affirm'. In essence, an affidavit is a statement in writing, made on oath or affirmation. Affirmation is a substitute for an oath in the case of certain religionists to object, on ground of conscience, to take an oath. There is no prescribed C form as to the wordings to be used in the affidavit under the RHC. So, I am of the view that in our case the words 'do affirm' without the word 'solemnly' is in order and not defective.

In *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437, his Lordship Gopal Sri Ram JCA (delivering the judgment of the Court of Appeal) at p 444 said:

D

> We find it unnecessary to undertake a detailed examination of the principles applicable to the present case. Suffice that we remind ourselves of what was said by this court in *Murugappa Chettiar Lakshmanan* (at p 788) in relation to the three hurdles which a caveat must surmount before it may be permitted to remain upon the register.
>
> E The principles formulated in *Luggage Distributors* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two F questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

The said caveat was lodged by the plaintiff pursuant to s 173 of the Land Code. That section states as follows:

G

> Any person —
>
> (a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied or otherwise howsoever;
>
> H [(b) and (c) not relevant]
>
> may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

For the plaintiff to be able to lodge and maintain the said caveat, the plaintiff must first satisfy the court that she has a caveatable interest in the I said land. To have a caveatable interest the plaintiff must come within the category of person in s 173(a) of the Land Code as mentioned above for in the circumstances of this proceeding paras (b) and (c) of the said section do not apply.

The statutory declaration of Fung Yuk Lien @ Foong Yuk Lien (f) annexed to the caveat instrument (exh 'F2') reads as follows:

(1) My father, Foong Chok Pan was the original registered proprietor of all that parcel of land situate at Sungai Salim, Sibu, containing an area of 1.3719 hectares, more or less, and described as Lot 134 Block 16 Seduan Land District (hereinafter referred to as 'the said land').

(2) My father transferred to the said land to my mother, KONG MUK TEI (F) (BIC K320643) vide Sibu Land Instrument No L 3294/1968 of 24 June 1968.

(3) Sometime after the said land was transferred to my mother, my brother, FOONG CHEE SAM @ FONG CHEE SAM persuaded my mother to charge the said land for the purpose of obtaining a loan for his own use. The said land was later pledged to someone whose name was and is until to me.

(4) The loan obtained was never repaid by my mother nor by my brother. Sometime in the later half of 1977: both my sister, FOONG YUK MOI (F) (BIC K319930) and myself settled the said loan and in consideration of our settling the said loan and getting back the land title deed which was pledged to the lender, my mother transferred the said land to both my sister and myself ($^1/_2$ undivided share each) for a further consideration sum of RM30,000 vide Sibu Land Registry Instrument No L 3179/1977 of 6 September 1977.

(5) Since my mother was staying with me and I have been looking after her since the late 1950s and she has no income nor any property to support herself and to ensure that my mother will be fully protected in the event that both my sister and myself shall predecease our mother, we transferred the said land to our mother in consideration of the natural love and affection which we bear towards her.

(6) The said land was transferred to my mother on the understanding that the said land shall revert to both my sister and myself if my mother shall predecease me or my sister. Since then I have been keeping the original copy of the land title deed and the quit rent booklet.

(7) Even though the said land was transferred to my mother, the said land still belongs to me and my mother had intended to retransfer the same to me at a later date.

(8) Lately it has come to my notice and attention that my brother, Foong Chee Sam @ Fong Chee Sam has tried to get my mother to transfer the said land to him.

(9) I make this declaration for the purpose of lodging a caveat against the said land to prevent any dealing by my mother or my brother.

From paras 5, 6 and 7 of the statutory declaration, it is clear that the plaintiff is claiming the right to caveat the land because in her own words: 'The said land was transferred to my mother on the understanding that the said land shall revert to both my sister and myself if my mother shall predecease me or my sister'.

The plaintiff in her affidavit in support in para 12 has averred that her sister (Foong Yuk Moi) (since deceased) and herself settled the loan with the chargee Ling Hee King on 17 October 1969. However, Foong Chee

A Sam @ Fong Chee Sam in his affidavit in para 4 averred, inter alia, that to settle the loan his mother charged the said land to Ling Hee King on the same day the land was transferred to his mother. The consideration in the memorandum of transfer was given as RM1,500 but no money was paid. He also averred that the plaintiff had therefore fraudulently misrepresented that it was he who asked his mother to borrow the said RM1,200 from Ling B Hee King. He never received the said RM1,200.

So, here, there is a serious issue raised, that is, who borrowed the money and who repaid the money to the chargee.

The plaintiff in para 16 of her affidavit in support has averred that her deceased sister and herself paid their mother RM30,000 for the transfer of C the said land and another piece of land to them. However, Foong Chee Sam @ Fong Chee Sam in para 9 of his affidavit has averred that when he confronted his sisters, they admitted that no consideration money was actually paid and that the sum of RM30,000 was solely for stamp duty purposes.

D I am of the view that there is an issue raised as to whether the plaintiff and her deceased sister did pay RM30,000 to the defendant or not.

The plaintiff has in para 19 of her affidavit in support averred that the said land was transferred to her mother on the understanding between them that the said land shall revert to both her sister and herself if her mother shall predecease her or her sister.

E So there is a triable issue raised as to whether there is a resulting or an implied trust in respect of the said land or not.

In *Agnes Wong Yen Hee v Tan Cheong Tie* [1992] 3 CLJ 1393, his Lordship Abdul Kadir Sulaiman JC (as he then was) at p 1406 said:

F > So notwithstanding the repeal of the Application of Laws Ordinance (Cap 2) by the Civil Law Ordinance (Extension) Order 1971, the Statute of Frauds remains applicable in Sarawak by virtue of Civil Law Act 1956. According to *Chong Ngian Shoon v Chai Choon Moi* (f) in Kuching — Suit No KG 57 of 1983, s 4 of the English Statute of Frauds (1677) as amended by the Law Reform (Enforcement of Contracts Act 1954) applies in Sarawak by operation G of the Civil Law Act 1956 and this requires the execution of a memorandum or note in writing for contract of guarantee only. Section 40 of the Law of Property Act 1925 is not included in the second schedule to the Civil Law Act 1956 nor is it applicable to Sarawak under s 3(1) of the Civil Law Act 1956 because it deals with subjects which are also covered under our Land Code and Contract Act 1950. So in the light of the decision in *Chong Ngian Shoon*, H the oral sale and purchase agreement purportedly entered into between the applicant and the respondent in this application is not subject to the provisions of the Statute of Frauds and if properly entered into will be enforceable notwithstanding that it is only oral in nature.

As such I am of the view that an implied or resulting trust affecting land in Sarawak need not be in writing and that the English Statute of Frauds 1677 I and the English Law of Property Act 1925 has no application in Sarawak.

So I am of the view that the implied or resulting trust does give rise to the plaintiff to a registrable interest which can be entered as a caveat.

Under s 173(a) of the Land Code, any person claiming to be entitled to or to be beneficially interested in any land, estate or interest under the Land Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever may at any time lodge with the Registrar a caveat in Form Q in the first schedule.

Section 174(1) of the Land Code reads as follows:

> Every caveat shall be signed by the caveator, or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator and how it is derived from the proprietor. It shall also appoint a place, or give an address, within Sarawak at or to which notices and proceedings relating to the caveat may be served or addressed.

I am of the view that the words 'shall state with sufficient certainty the nature of the estate or interest claimed by the caveator' in s 174(1) of the Land Code is a mandatory provision. Thus, the caveator must specify the nature of the claim whether it is in respect of the whole land or a portion of it.

In the caveat instrument No L 8846/1995 the claim to enter the caveat is as follows:

> TAKE NOTICE that I, FUNG YUK LIEN @ FOONG YUK LIEN (F) (WN KP 400 25-13-5210 CHINESE) of No 6, Lorong Sentosa Barat 1B, Jalan Sentosa, Off Jalan Salim, 96000 Sibu, Sarawak claiming to be entitled to or to be beneficially interested in all that parcel of land situate at Sungai Salim, Sibu, containing an area of 1.3719 hectares, more or less and described as Lot 134 Block 16 Seduan Land District under and by virtue of a Statutory Declaration, a photocopy of which is annexed hereto and marked 'X' DO HEREBY FORBID the registration of any transfer or other dealing affecting the said land until this caveat is withdrawn by me or is otherwise removed or lapses in accordance with the provisions of the Land Code.

Paragraph 6 of the statutory declaration reads as follows:

> The said land was transferred to my mother on the understanding that the said land shall revert to both my sister and myself if my mother shall predecease me or my sister.

When the statutory declaration was sworn on 16 August 1995 by the plaintiff her sister Foong Yuk Moi (f) had already passed away on 17 June 1995. The plaintiff in the statutory declaration did not state that she was also representing the estate of her deceased sister to lodge the caveat. It was also not stated that the claim to the said land was on behalf of herself and the estate of her deceased sister.

As such, I am of the view that from the statutory declaration the plaintiff is only claiming for herself which is only half of the whole land.

In *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 the judgment of the Federal Court under holdings (1) and (2) read as follows:

> Held, answering the question in the affirmative and allowing the appeal:
>
> (1) The proviso to s 322(1) prohibits the entry of a caveat over part of the land, but says nothing about the validity of a caveat over the whole land

which is limited to protect a registrable interest in a portion thereof. The proviso must be read having regard to the section itself and the Code as a whole. To say that the proviso prohibits a caveat to protect an interest in part of the land would mean that dealings in part of the land, which are permitted under the Code, would not be capable of being protected by caveat.

(2) The proviso to s 322(1) is purely declaratory of the principles enunciated in *N Vangedaselam v Mahadevan & Anor* [1976] 2 MLJ 161. A person who claims a registrable interest in a portion of land may caveat the whole land, provided the caveat is expressly limited to protect only that claim, which must be an interest recognized under the Code as being either registrable or entitled to protection.

Under the Land Code, there is no express provision to prohibit the entry of a caveat over part of the land. So I am of the view that under the Land Code a person can caveat a part of the land respectings his portion of the claim.

The interest of the plaintiff in the present case before me as alleged by her extended to only half a portion of the said land. However, in the caveat instrument, the caveat was expressed to bind the whole of the said land.

In our case the plaintiff should only caveat a portion of the said land and not the whole of the said land. However, since the plaintiff has caveated the whole of the said land she should have followed the procedure as stated in *Chor Phaik Har v Farlim Properties Sdn Bhd* where His Lordship Edgar Joseph Jr FCJ (delivering the judgment of the Federal Court) at p 35 said:

> In other words, we would answer the question arising upon the preliminary point of law in favour of the appellant caveator; that is to say, that the proviso to s 322(1) is purely declaratory of the principles enunciated in *Vangedaselam*.
>
> In particular, we endorse the following passages in the judgment of Suffian LP in *Vangedaselam*.
>
> On the scope of ss 322, 323 and 324, his Lordship said [1976] 2 MLJ 161 at pp 162–163):
>
> > 'I am of the opinion ... you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.'

I am of the view that under s 174 of the Land Code a person who claims an interest in a specific portion of land may caveat the whole land provided that the effect of the caveat is to cover the particular interest claimed.

In our case, however, the plaintiff caveated the whole of the said land without expressly stating that it was to protect her limited interest in the said land only.

In my view the caveat contained a serious defect in failing to comply with the mandatory requirement of s 174(1) of the Land Code.

I am of the view that her entry of the caveat against the whole of the said land was, therefore, null and void and of no effect.

I shall next deal with the issue whether the court has the power to allow a defective or invalid caveat to be amended.

Section 177(1) and (2) of the Land Code provides as follows: A

(1) Any registered proprietor or any other person having a registered estate or interest in the estate or interest against which a caveat has been lodged, may at any time, if he thinks fit, apply to the High Court for an order that the caveat be removed.

(2) The court, upon proof that notice of such application has been duly served, may make such order in the premises, either ex parte or otherwise, as in the circumstances seems just. B

Under s 177 the court is only given discretion whether to order the caveat to be removed or not. It does not give discreation to the court to order that a defective or invalid caveat to be amended by the caveator or by the court. C

Section 181 of the Land Code reads as follows:

> When any caveat has lapsed, it shall not be lawful for the Registrar to receive any second caveat, affecting the same land, estate or interest, by the same person or in respect of the same right and for the same cause, except by order of the High Court.

Section 181 deals with any caveat that has lapsed. This section does not give power to the High Court to amend a defective or invalid caveat lodged. Neither does this section allow the caveator to amend a defective or invalid caveat. D

As the caveat instrument has caveated the whole of the said land instead of only limiting to the extent of the plaintiff's claim, I am of the view that this is a serious defect which renders the caveat void. On this ground alone, I order that the caveat lodged by the plaintiff to be removed from the register forthwith. E

The costs of this application shall be paid by the plaintiff to the defendant to be taxed unless agreed. F

Order accordingly.

Reported by Jafisah Jaafar

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